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In the High Court of Judicature for Rajasthan
Jaipur Bench

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Cr. Misc. Petition No.902/1998
Sobha Ram **Versus** State & Kanhaiyalal

Date of Order :: 10/10/07

Hon'ble Mr. Justice Ajay Rastogi

Mr. S.R.Bajwa), for petitioner (accused)
Mr. VR Bajwa)
Mr. Arun Sharma, Public Prosecutor

Instant petition U/s 482 CrPC is directed against order dt.09/07/98, whereby Special Judge (SC/ST Cases), Ajmer in exercise of powers U/s 319, CrPC on the application of complainant during trial in Sess. Case No.25/95, took cognizance of offence U/Ss 302 & 302/149, IPC against petitioner who is employed as police constable.

Facts, in brief, relevant for purposes of controversy raised herein are that on 05/12/1994 at about 11.10 AM one Kanhaiyalal lodged a written report at P.S. Gegal (Ajmer) for an incident having taken place in early morning at about 5 AM. It was inter-alia alleged therein that while he was irrigating his fields through common Well in course of his turn on that day and was accompanied with Surajmal & Bal Kishan besides one Amar Chand being present at the spot, while Ganesh, Gheesu & Sobha were on way to their fields for irrigation, they

were stopped to smoke Bidi with him (informant) at about 4 AM - that time, Ramkaran S/o Kuka, Mohan S/o Baldev asked him to stop Well's engine, to which he refuted saying of his fields being in process of irrigation so as to irrigate next day also but both Ram Karan & Mohan left the place hurling threats to the informant and after a while, Hardayal & Madan also joined him near Well where he was busy irrigating his fields. However, at about 5 AM, about 25 persons named in the report including Sbhoaram (petitioner herein) forming an unlawful assembly came together at the place of incident duly armed with sharp edged weapons like axe and opened with assaults inflicting the multiple blows on their persons - as a result whereof, three persons (Balkishan, Ganesh & Surajmal) lost their lives. It is relevant to point out that petitioner herein was specifically named in the report, as one of accused persons with the allegation of attributing to have caused multiple blows by axe on the person of Surajmal (deceased).

On aforesaid report, FIR-131/94 was registered for offences U/Ss 147, 148, 149, 323, 326, 307 & 302, IPC against 23 accused persons named therein. After investigation, police filed challan against 22 persons out of total 23 except

petitioner despite named in the FIR, besides two more persons (Sualal & Jagdish) not named in the FIR. After accused persons were charged, the trial commenced - in course whereof, prosecution eye witnesses (Hardayal (Pw1), Madan (Pw2), Kanhaiyalal - informant (Pw3), Shobharam S/o Ganesh (Pw4), Gheeshu (Pw5) & Devdutt (Pw6) were examined and they all corroborated incriminating version that petitioner Shobharam was having axe in his hand and inflicted multiple axe blows on the person of deceased Surajmal in course of scuffle.

At first instance on 06/04/95, Public Prosecutor moved application U/s 319, CrPC to array petitioner as an accused while prosecution evidence has not yet commenced, hence application was got dismissed as not pressed. When last prosecution witness (Pw28), Setharam (investigating officer) was recorded, yet another application was filed U/s 319 CrPC on 24/10/97 but that too was dismissed as not pressed for good reasons known to the prosecution. After statements of accused were recorded U/s 313, CrPC, and matter had ripen for final hearing and in fact at one occasion arguments were heard but remained inconclusive, at that time, complainant (respondent NO.2) filed application U/s 319, CrPC, which was allowed vide order dt.09/07/98

and the trial Judge on the basis of material came in prosecution evidence during trial, took cognizance of offences U/s 302, 302/149, IPC against the petitioner and summoned him through arrest warrant - against which he has filed instant petition on 13/07/98.

Vide order dt.15/07/98, this Court directed the trial Court not to pronounce the judgment till further orders and send the record but subsequently after hearing the counsel for complainant, as well, vide order dt.30/07/98 this Court vacated order dt.15/07/98 and the record was ordered to be returned back forthwith to the trial Court directing to proceed further but stayed execution of arrest warrant against petitioner.

Accordingly the trial Judge proceeded to conclude the trial and vide judgment dt.06/08/98 convicted & sentenced the accused persons facing trial for committing murder of Ganesh, Balkishan & Surajmal ad infra:

U/s 302/149 IPC - each to suffer life imprisonment
U/s 325/149 IPC - each to suffer 3 Years' RI
U/s 323/149 IPC) - each to suffer 1 year's RI
147 & 149 IPC)

Against which, accused persons (Ramkaran & 23 Ors) preferred criminal appeal (No.634/1998) before Division Bench and vide judgment dt.04/12/2001,

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this Court upheld the conviction & sentences of 17 accused persons who were named in the FIR but also at the stage of statements recorded U/s 161 CrPC, and acquitted seven accused (Devraj, Raghuveer, Prabhu, Jagdish S/o Madhu, Sua, Baldev & Rama) from the charge U/Ss 302/149, 325/149, 323/149, 147 & 149, IPC giving them benefit of doubt. Against D.B. Judgment of this Court confirming their conviction & sentences, accused persons preferred Special Leave to Appeal (Crl) No.2547/2002, which too was dismissed by Apex Court vide order dt.10/07/02.

Counsel for petitioner raised two fold arguments for consideration. First contention is that on two occasions, applications U/s 319, CrPC were earlier filed at first instance on 06/04/95 and subsequently on 24/10/97 while 2nd application was filed at the stage when last prosecution witness Setharam (Pw28) (IO) was recorded - at that time, prosecution evidence was complete, yet Public Prosecutor before trial Court did not press 2nd application U/s 319, CrPC; in such circumstances, 3rd application at the instance of complainant invoking discretionary powers of trial Judge U/s 319 CrPC when trial itself was to conclude being at the stage of pronouncement of judgment, in the facts of instant case was not maintainable as it

was nothing but a review of earlier decision, which is otherwise not legally sustainable especially in view of S.362, CrPC. In support, Counsel relied upon decision of Apex Court in **P.Gounder Vs. State (2005(12) SCC 327)**; in such circumstances, if he is now being prosecuted, it will be nothing but an abuse of process and requires interference by this Court invoking inherent jurisdiction U/s 482, CrPC.

Counsel further submits that cognizance has been taken against petitioner for offence U/s 302, 302/149, IPC while offence U/s 149, IPC relates to commission of an unlawful assembly, which stands settled finally by Apex Court by virtue of rejection of SLP preferred by other accused who were facing trial and in view thereof once commission of unlawful assembly punishable U/s 149, IPC attained finality, as such calling upon instant petitioner to stand for de novo trial under order impugned will be nothing but a mere formality since question is not now available for re-consideration by trial Judge in case of trial against petitioner under order impugned. According to Counsel, consideration of such a question of commission of unlawful assembly is an issue estoppel in the light of decision of Apex Court in **Manipur Admn. Manipur Vs. Thokchom Bira Singh (AIR**

1965 SC 87).

No one appeared on behalf of complainant despite service of notice. Public Prosecutor on the other hand while supporting the order impugned, submits that there is no legal bar for invocation of powers U/s 319, CrPC and it is only a satisfaction of trial Judge as to whether incriminating material came on record during trial which prima facie substantially makes out a case for involvement of a person, as well for commission of offence as alleged in course of evidence recorded during trial; and as regards instant case, learned trial Judge has recorded in order impugned that not only in FIR but also in course of investigation, and so also during trial while recording of statements of prosecution witnesses, petitioner has specifically been named by all of eye witnesses who corroboratively deposed that the petitioner was armed with axe, with which he gave multiple blows on the persons of deceased Surajmal which directly incriminated the petitioner attributing commission of offence alleged of murder of deceased in the incident; as such the trial Judge has not committed any error while passing order impugned for taking cognizance against petitioner, which may call for interference.

This Court has considered contentions of both the parties and with their assistance, examined material on record. Narration of facts (supra) depicts that FIR lodged by Kanhaiyalal (respondent No.2) specifically named the petitioner attributing his culpable act of inflicting multiple axe blows on the person of deceased (Surajmal) in the incident and this part of incriminating facts have also been corroborated by all the eye witnesses in their statements U/s 161 CrPC; and despite it, for reasons best known, the investigating officer failed to file challan against petitioner.

No doubt, learned Magistrate has not proceeded to take cognizance against him while invoking powers U/s 190, CrPC and even after case was committed to Court of Sessions U/s 193, CrPC, but it will not in any manner debar the trial Judge from taking cognizance against an accused even at a later stage in exercise of powers U/s 319, CrPC, when it satisfied upon material brought on record through statements of eye witnesses (Pw1 to Pw6) recorded during trial wherein they specifically named the petitioner duly armed with and inflicting multiple axe blows upon deceased Surajmal.

Scope of S.319, CrPC has been examined by

Apex Court in **Municipal Corp. of Delhi Vs. Ram K.Rohtagi (1983(1) SCC 1)** followed in **Mohd. Shafi Vs. Mohd. Rafiq (JT 2007(5) SC 562)** ad infra:

"19. In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really un-extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the Court concerned so that it may act according to law."

In **Lokram Vs. Nihal Singh (2006(1) SCC 192)** Apex Court observed ad infra:

"10. On a careful reading of Section 319 of the Code as well as the aforesaid two decisions, it becomes clear that the trial court has undoubted jurisdiction to add any person not being the accused before it

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to face the trial along with other accused persons, if the Court is satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that **such person even though had initially been named in the F.I.R. as an accused, but not charge sheeted, can also be added to face the trial.** The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge sheet or the case diary do not constitute evidence. Of course, as evident from the decision reported in **Sohan Lal and others v. State of Rajasthan, (AIR 1990 SC 2158)** the position of an accused who has been discharged stands on a different footing."

In **Mohd. Shaif Vs. Mohd. Rafiq** (supra)

Apex Court observed ad infra:

"13. From the decisions of this Court, as noticed above, it is evidence that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, **it must arrive at the**

satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of cross examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence."

Even a bare reading of S.319, CrPC clearly depicts that if a person not before Court as an accused of offence which from the evidence, appears to have committed, Court may summon such person to face trial. Section 319, CrPC does not exclude from its purview a person not being an accused before Court in a case in which order for his summoning is passed despite the fact of such a person being an accused in another case although of same incident but with different version at different stages. Words, "any person not being accused" appearing in S.319, CrPC, would certainly covers such person not already before Court to array him as an accused in course of trial.

It is always duty of Court to bring before it any person who appears to have committed offence, and convict him by passing appropriate order on proof of his culpable act. It is also true that at this stage the Court is not called upon to

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appreciate such material for consideration in exercise of jurisdiction U/s 319, CrPC, with a view to sift & evaluate as to whether such an evidence is sufficient for ultimate conviction for such a person sought to be summoned for prosecution. Section 319 CrPC contemplates consideration of legal evidence appearing in course of trial which is sufficient to make out prima facie material satisfying ingredients constituting offence for prosecution of such person sought to be summoned.

Question is as to whether one can be summoned to proceed after conclusion of trial in exercise of powers U/s 319, CrPC or not. Such a question was considered by Apex Court in **Shashikant Singh Vs. Tarkeshwar Singh (JT 2002(4) SC 386)**. Apex Court held that the words "could be" tried together with the accused" in S.319 (1) cannot be said to be capable of only one construction and in that event, approach to be adopted would be different since legislative intent is to be respected despite consequences of interpretation. Apex Court observed ad infra :

"8.The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has

committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the Court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses re-heard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination in chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words 'could be tried together with the accused' in Section 319 (1), appear to be only directory. 'Could be' cannot under these circumstances be held to be 'must be'.

"10. The mandate of the law of fresh trial is mandatory whereas the mandate that newly added accused could be tried together the accused directory."

On a careful reading of S.319, CrPC, it is evident that proceedings against person summoned U/s 319(1)

are required to be commenced afresh and witnesses reheard; meaning thereby entire proceedings have to recommence from the very inception of trial - in course whereof, all witnesses have to be examined afresh; and while to cross examine such witnesses, opportunity has to be afforded to such newly added accused and thus there has to be a de novo trial in the light of S.319(4) CrPC.

That being so, in the light of what has been observed by Apex Court (supra), contention of Counsel for petitioner that once the trial of an incident qua accused already facing trial, has culminated into conviction by virtue of affirmation by High Court and even by Apex Court, atleast for alleged commission of offence of unlawful assembly, summoning the petitioner in exercise of powers U/s 319 CrPC to face trial for self same allegation of unlawful assembly in the absence of other accused, being barred by issue estoppel, will cause miscarriage of justice, is devoid of merit and the judgment in **Manipur Admn Manipur Vs. Thokchom Bira Singh (AIR 1965 SC 87)** cited on the issue estoppel is of no assistance for the simple reason that there will be a denovo trial against petitioner sought to be prosecuted in exercise of powers U/s 319 CrPC and question of issue estoppel does not

arise in facts of instant case.

That apart, in instant case, trial Judge in his order has given cogent reasons and after having taken note of statements of eye witnesses (Pw1 to Pw6) recorded during trial considered to take cognizance against petitioner as well on application of complainant U/s 319 CrPC but since there was also direction of this Court to conclude trial against other accused already facing trial before exercise of powers U/s 319 CrPC, the judgment was pronounced and in such circumstances, it will in no manner come in way causing prejudice to instant petitioner who has to face de novo trial in the light of S.319(4) CrPC for the incident for which he prima facie appears to have been involved for commission of offence alleged in the evidence produced during trial.

Contention of entertaining 3rd application of complainant culminating into summoning petitioner U/s 319 CrPC to stand for trial for the incident in question, being not maintainable on the assertion that two applications were earlier rejected by trial Court, being tantamount to review of earlier orders and not permitted U/s 362 CrPC; is of no substance for the reason that Section 319 CrPC can be invoked at any stage whenever material

comes in course of any inquiry/investigation or trial, the Court can take cognizance against any person not being accused before it and there is no restriction for taking cognizance in exercise of powers U/s 319, CrPC and Section 362, CrPC, reference whereof has been made by Counsel has no application in the facts of instant case particularly when earlier two applications were got rejected as not pressed indisputably having not been considered on merits and in the light of observations made by Apex Court in **Mohd. Shafi Vs. Mohd. Rafiq (supra)** ad infra:-

"We would, however, make it plain that **the mere fact that the proceedings have been quashed against respondent Nos.2 to 5 will not prevent the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it.**"

In instant case, for good reasons known to Public Prosecutor who got two applications rejected as not pressed, but on instant 3rd application U/s 319, CrPC at the instance of complainant whose rights being independent cannot be distinguished on such grounds raised herein and the judgment in **Surendra**

Singh (2005(12) SCC 361) on which the Counsel placed reliance is of no assistance.

In the opinion of this Court, legal evidence of eye witnesses (Pw1 to Pw6) has come on record during trial against petitioner pointer to the offence of which cognizance has been taken under order impugned. This Court has also gone through the record particularly statements of eye witnesses (supra) duly taken note of by trial Judge and does not find any infirmity in taking cognizance by trial Judge in exercise of jurisdiction U/s 319 CrPC under the order impugned against petitioner for alleged offences and it does not call for any interference.

Consequently, misc. petitions fails and is hereby dismissed. Record be sent back forthwith per special messenger to the trial court directing to expedite the trial against petitioner in accordance with law.

(Ajay Rastogi), J.